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Possible future work on transport law

Possible future work on transport law

Report of the Secretary-General

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I. Introduction

1. When considering future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at its twenty-ninth session, in 1996,[1] the United Nations Commission on Trade Law (UNCITRAL) considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.[2]

2. The Commission was told that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies (see A/CN.9/476, para. 2).

3. It was then suggested that the Secretariat should be requested to solicit views and suggestions on those difficulties not only from Governments but in particular from the relevant intergovernmental and non-governmental organizations representing the various interests in the international carriage of goods by sea. An analysis of those views and suggestions would enable the Secretariat to present, at a future session, a report that would allow the Commission to take an informed decision as to the desirable course of action (see A/CN.9/476, para. 3).

4. Several reservations were expressed with regard to the suggestion. One was that the issues to be covered were numerous and complex, which would strain the limited resources of the Secretariat. Priority should instead be given to other topics that were, or were about to be, put on the agenda of the Commission. Furthermore, it was said that the continued coexistence of different treaties governing the liability in the carriage of goods by sea and the slow process of adherence to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules),[3] made it unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. Indeed, there was some danger that the disharmony of laws would increase (see A/CN.9/476, para. 4).

5. In addition, it was said that any work that would include the reconsideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules, which would be an unfortunate result. It was stressed that, if an investigation were to be carried out, it should not cover the liability regime. It was, however, stated in reply that the review of the liability regime was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties (see A/CN.9/476, para. 5).

6. Having regard to those differing views, the Commission did not include the consideration of the suggested issues on its agenda at that stage. Nevertheless, it decided that the Secretariat should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors (see A/CN.9/476, para. 6).

7. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed

decision as to the desirable course of action.[4] Strong support was expressed at that session for the exploratory work being undertaken by CMI and the Secretariat of the Commission. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level.[5]

8. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved. In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had offered their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings of the working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The working group had found a number of issues that had not been covered by the current unifying instruments. Some of the issues were regulated by national laws that were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was reported that the working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts and a number of other ancillary contracts). The working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability to determine their compatibility with a broader area of rules on the carriage of goods.[6]

9. It was also reported at the thirty-second session of the Commission that the working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.[7]

10. At its thirty-second session, the Commission had expressed its appreciation to CMI for having acted upon its request for cooperation and had requested the Secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study with proposals for future work.[8]

11. At the thirty-third session of the Commission, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat of the Commission. It also heard an oral report on behalf of CMI. In cooperation with the secretariat of the Commission, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. At the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support and interest of the industry in the project.

12. Pursuant to the receipt of replies to the questionnaire, CMI had created an international subcommittee with a view to analysing the information and finding a basis for further work towards harmonizing the law in the area of international transport of goods. It was reported that the enthusiasm encountered so far in the industry and the provisional findings about the areas of law that needed further harmonization made it likely that the project would be eventually transformed into a universally acceptable harmonizing instrument.

13. In the course of the discussions in the CMI subcommittee, it had been noted that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represented only a relatively short leg of an international transport of goods. In the container trade, even a port-to-port bill of lading would involve receipt and delivery at some point not directly connected with the loading onto, or discharge from, the ocean vessel. Moreover, in most situations it was not

possible to take delivery alongside the vessel. Furthermore, where different modes of transport were used, there were often gaps between mandatory regimes applying to the various transport modes involved. It had been proposed, therefore, that in developing an internationally harmonized regime covering the relationships between the parties to the contract of carriage for the full duration of the carrier's custody of the cargo, issues that arose in connection with activities that were integral to the carriage agreed to by the parties and that took place before loading and after discharge should also be considered, as well as issues that arose under shipments where more than one mode of transport was contemplated. Furthermore, while the emphasis of the work, as originally conceived, had been on the review of areas of law governing the transport of goods that had not previously been covered by international agreement, it had been increasingly felt that the current broad-based project should be extended to include an updated liability regime that would complement the terms of the proposed harmonizing instrument.

14. Several statements were made in the Commission to the effect that the time had come for active pursuit of harmonization in the area of the carriage of goods by sea, that increasing disharmony in the area of international carriage of goods was a source of concern and that it was necessary to provide a certain legal basis to modern contract and transport practices. The carriage of goods by sea was increasingly part of a warehouse-to-warehouse operation and that factor should be borne in mind in conceiving future solutions. Approval was expressed for a concept of work that went beyond liability issues and dealt with the contract of carriage in such a way that it would facilitate the export-import operation, which included the relationship between the seller and the buyer (and possible subsequent buyers) as well as the relationship between the parties to the commercial transaction and providers of financing. It was recognized that such a broad approach would involve some re-examination of the rules governing the liability for loss of or damage to goods.

15. It was observed that some regional organizations, such as the Organization of American States and the Economic Commission for Europe (ECE), were currently considering transport law issues. It was considered that the texts already formulated by those organizations would be useful in the work of the Commission and also that their work would be facilitated by universally applicable texts to be developed by the Commission. It was observed that ECE was currently considering whether to undertake work on uniform rules for the multimodal transport of goods. Concern was expressed that, if any such work were to be undertaken by an organization in which not all regions of the world were represented, it would interfere with efforts to prepare a universally applicable regime. Hope was expressed that the organizations concerned would coordinate their work so as to avoid duplication and that States would be mindful of the need for coordination within their own administrations of the work of their delegates in those organizations.

16. In the context of the thirty-third session of the Commission, a transport law colloquium, organized jointly by the Secretariat and CMI, was held in New York on 6 July 2000.

17. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, and to incorporate that information into a report to be presented to the Commission at its thirty-fourth session, in 2001, identifying issues in transport law in respect of which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions.

18. The papers and debate arising from the colloquium provide invaluable preparatory work to determine with greater clarity possible approaches to resolving transport law problems that should become the subject of the Commission's work. It allowed a broad range of interested organizations, including CMI and FIATA, and representatives of both carrier and shipper industry bodies, to provide their views on possible areas where transport law was in need of reform.

19. A majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the

use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; and identifying the terms or liability regime that should apply as well as the financial limits of liability and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

20. The Commission welcomed the fruitful cooperation between CMI and the Secretariat. Several statements were made to the effect that it was necessary throughout the preparatory work to involve other interested organizations, including those representing the interests of cargo owners. It was stressed that only by ensuring the cooperation of all interested industries at all stages of the preparatory work was there hope to develop a regime that would be both broadly acceptable and capable of being implemented within a short span of time. The Commission requested the Secretariat to continue to cooperate actively with CMI with a view to presenting, at the next session of the Commission, a report identifying issues in transport law in respect of which the Commission might undertake future work and, to the extent possible, also presenting possible solutions. The present report has been prepared pursuant to that request.

II. Possible scope of work and issues to be dealt with in a future instrument on the carriage of goods by sea

21. The CMI International Subcommittee, in which all maritime law association members of CMI are invited to participate, met four times during 2000 to consider the scope and possible substantive solutions for a future instrument on transport law (27 and 28 January, 6 and 7 April, 7 and 8 July and 12 and 13 October). A number of other non-governmental organizations participated as observers in those meetings, including FIATA, the Baltic and International Maritime Council (BIMCO), ICC, ICS, IUMI and the International Group of P&I Clubs. The tasks of the Subcommittee, as laid down by CMI in consultation with the secretariat of the Commission, have been to consider in what areas of transport law that are not at present governed by international liability regimes greater international uniformity may be achieved; to prepare an outline of an instrument designed to bring about uniformity of transport law; and then to draft provisions to be incorporated into the proposed instrument, including provisions relating to liability; in addition, the Subcommittee is to consider how the instrument might accommodate other forms of carriage associated with carriage by sea. The draft outline instrument and a paper on door-to-door issues were discussed at the major CMI international conference held in Singapore from 12 to 16 February 2001; pursuant to the discussion at the conference, the Subcommittee will continue its work with a view to identifying solutions that are likely to attract agreement among the industries involved in the international carriage of goods by sea.

22. What follows is a summary of the considerations and suggestions that have resulted so far from the above-mentioned discussions prior to the Singapore conference. The details of possible legislative solutions are not presented here because they are currently being worked on by the International Subcommittee to take into account the views expressed at the Singapore conference and other views. However, the summary should enable the Commission to assess the thrust and scope of possible solutions and decide on how it wishes to proceed with respect to this topic.

A. Definitions

23. It is suggested that the future instrument should contain definitions designed to facilitate the operation of the substantive chapters. Some definitions, such as the definition of the term "performing carrier", have provoked significant discussion within the International Subcommittee and at the Singapore conference. Those discussions have concerned the underlying rule and will be outlined below.

B. Scope of application

24. A specific chapter, based broadly on article 2 of the Hamburg Rules, should address the issue of the

scope of application of the instrument. The chapter has not been particularly controversial in its own right, but its drafting will be dependent on the resolution of the "period of responsibility" question, that is, the geographical reach of the draft outline instrument. This closely related issue is addressed below.

25. The current international regimes include an exclusion for carriage under charter parties. The exclusion dates from the International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), and has been retained in essentially the same form ever since. During the work of the International Subcommittee, the question was raised as to how broadly the exclusion should apply. Modern practice goes well beyond traditional charter parties. It will thus be necessary to decide if that traditional exclusion should continue to be limited to traditional charter parties or if it should be expanded to other contracts of carriage such as contracts of affreightment, volume contracts, service contracts and similar agreements.

C. Period of responsibility

26. Any instrument must resolve the "period of responsibility" question, that is, the geographical reach of the instrument. Two possible resolutions are illustrated under current law by the Hague Rules as Amended by the Brussels Protocol 1968 (the Hague-Visby Rules) and the Hamburg Rules. The former apply on a "tackle-to-tackle" basis, meaning that responsibility is imposed during the period from the time when the goods are loaded on to the time when they are discharged from the ship. The latter apply more broadly on a "port-to-port" basis, meaning that responsibility is imposed for the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. A third possibility would be a further broadening of the period of responsibility to cover any time during which the carrier is in charge of the goods, whether in the port area, on board the vessel, or elsewhere. As such it would cover the period often referred to as "door-to-door". While considerable support has been expressed for a door-to-door cover, more investigations must be conducted in order to accommodate all the consequences such an expansion of the scope would entail.

27. Once the basic period of responsibility is resolved, subsidiary issues remain to be determined. The most prominent of those questions is the extent to which a carrier may limit its period of responsibility by the structure of its contract. For example, may the issuer of a "through transport" document assume a carrier's liability for one portion of the carriage covered by the document but only a forwarding agent's liability for the remainder of the carriage?

D. Obligations of the carrier

28. It is suggested that one chapter should set out the obligations of the carrier in general terms. Controversial issues that relate to the carrier's obligations should be covered in other parts of the draft outline instrument, including the chapter dedicated to the period of responsibility and that dedicated to the liability of the carrier.

E. Liability of the carrier

29. One chapter should address what most people in the field consider to be the core issue in any legal regime governing the relationship between carrier and cargo interests, namely, the question of the extent to which a carrier is required to compensate the cargo owner when goods for which it is responsible are lost or damaged or when their delivery is delayed. There appears to be substantial support for a fault-based regime, as opposed to a more stringent basis of liability, as, for example, in the Convention on the Contract for the International Carriage of Goods by Road.[9] It remains for further discussion how detailed the liability provisions should be and the nature of any exemptions to the carrier's liability.

30. In addition, a number of more specific, subsidiary issues should also be addressed in the chapter dealing with the liability of the carrier. One unresolved issue is the allocation of damages when two or more causes combine to cause a loss and the carrier is responsible for one or more of those causes but not for all of them. One approach, illustrated by article 5.7 of the Hamburg Rules, puts the full burden of proving the allocation of damages on the carrier. Another approach, illustrated by the proposed amendments to the Carriage of Goods by Sea Act that are now pending before the Congress of the United States of America, would put equal

burdens on both parties, with an equal division of damages if neither party can carry its burden of proof.

31. Another unresolved issue is the extent to which a carrier's agents, servants and independent contractors, or any other party performing any of a carrier's obligations under a contract of carriage, are liable for the loss or damage that may be attributed to their breach of duty. (Those parties have been called "performing carriers" in the early work of the International Subcommittee, but the use of the term is subject to review.) One approach, common in some countries before the successful invocation of the "Himalaya clause", was to impose full liability on the performing carriers (typically on a tort basis) and deny them the benefit of the carrier's limitations and exclusions. Another approach, which may loosely be seen as the object of the Himalaya clause, is to make no provision for the performing carriers' liability but to ensure that any liability that might exist would be subject to the carrier's limitations and exclusions. A third approach, illustrated by the proposed amendments to the United States Carriage of Goods by Sea Act, would impose uniform liability on performing carriers (on the same basis as the contracting carriers) and give them the benefit of the carrier's limitations and exclusions. A fourth approach would impose liability on a "network" basis, whereby each performing carrier would assume liability on the basis of the legal regime that would apply if it were the only carrier and had contracted with the shipper directly. Thus, for example, a European road carrier could be liable on the basis of the Convention on the Contract for the International Carriage of Goods by Road.

32. Another unresolved issue is the extent to which a carrier should be liable for delay in delivery and the basis, if any, on which the carrier could limit its liability. One approach would hold the carrier liable for any unreasonable delay. An alternative approach would hold the carrier liable for delay only if the parties had made a special agreement governing the time when the goods would be delivered.

F. Obligations of the shipper

33. Under current international regimes, very little responsibility is imposed on the shipper, and the shipper's obligations—to the extent that they exist—are not well defined. During the work of the International Subcommittee, it was suggested that it would be beneficial to list the shipper's obligations more precisely.

G. Transport documents

34. In most cases, the contractual relationship between carrier and cargo interests is governed by a bill of lading or other transport document. The rules governing that transport document, however, are often not too well defined. Existing international conventions govern some of the core provisions (such as the description of the goods that must be included in the transport document), but also omit many important aspects (such as whether the transport document must be dated and the significance of an ambiguous date). During the work of the International Subcommittee, it was suggested that it would be beneficial to set out more fully the rules applicable in this area.

35. A number of discrete issues must still be resolved. For example, it is agreed that the carrier must issue a transport document if the shipper demands one. It is not clear, however, which of the parties that might be described as "the shipper" is entitled to make this demand—the contracting shipper (the party that is bound by the contract of carriage), the consignor (the party that delivers the goods to the carrier, perhaps on behalf of the contracting shipper) or some other party. Similarly, it is agreed that certain information should be included in the transport document, but it is not clear what liability, if any, should be imposed for failing to include the required information.

36. To give one more example, it is agreed that in some circumstances a transport document should be not simply prima facie evidence but conclusive evidence of the issuing carrier's receipt of the goods as described in the transport document. But it is not clear how those circumstances should be defined. One possibility would be to limit the rule to the context of a negotiable transport document that has been duly negotiated to a third party acting in good faith. Another possibility would be to extend the rule to protect any third party acting in good faith that has paid value or otherwise altered its position in reliance on the description of the goods in the transport document.

37. Perhaps the most troublesome set of issues regarding transport documents relates to the carrier's

ability to limit its liability for descriptions in the transport document that it has failed to verify. It is agreed that in some circumstances a carrier may qualify a description in the transport document with a phrase such as "said to contain" or "shipper's load and count", but it is not clear how those circumstances should be defined. One possibility, broadly speaking, which is generally consistent with the law in some countries, would be to recognize and give effect to such qualifying phrases with little regard for the circumstances under which they were included in the transport document. A second possibility, again in broad terms, which is generally consistent with the law in other countries, would be to hold the qualifying phrases invalid as attempts to limit the carrier's liability in a manner not permitted by the governing rules. A third, compromise, possibility is suggested by the proposed amendments to the United States Carriage of Goods by Sea Act, which would recognize and give effect to the qualifying phrases only in carefully defined circumstances so as to protect the interests of cargo as well.

H. Freight

38. During the work of the International Subcommittee, it was suggested that in order to list all of the obligations and rights of the parties, it would be advisable to include a chapter containing a default system regulating freight. Such a chapter should be non-mandatory, as the parties should be free to regulate the details of the freight in their own contract. Traditional problems to be covered should include when the freight is considered to be earned and when the freight is payable. Furthermore, the instrument should provide that freight is not subject to set-off, deduction or discount.

39. A particular issue arises when the parties to a sales contract have agreed that the freight should be paid by the shipper (e.g. in a cost, insurance and freight (CIF) contract). In such a case the consignee (and buyer) would wish to be protected from having to incur freight costs when taking delivery of the goods. Therefore, the instrument could provide that, if the transport documentation shows that the freight has been pre-paid, the carrier loses any right to claim that freight from the consignee (even if the freight was, in fact, not pre-paid).

40. An important question related to freight is whether the carrier may retain the cargo when the consignee is not prepared to pay the freight and costs relating to the transportation of the goods. Most national laws provide for such right and many contracts provide for a contractual right of retention. Often, that right is also referred to as a "lien", which under some national laws includes a preferred right of the carrier to the value of the goods in cases of bankruptcy of the consignee. International trade would gain much certainty if an instrument could clearly define the basic right of retention or lien that a carrier has against the cargo owners. In doing that, the instrument must define the claims for which the lien exists and the steps the carrier must take to obtain financial security or the privileges of the lien in the event of the cargo interests' insolvency.

I. Delivery to the consignee

41. Delivery is a key concept for the carriage of goods. Among other things, it typically marks the completion of the contract of carriage and the termination of the carrier's responsibilities. Existing international regimes deal with delivery only to a limited extent. Under the Hague-Visby Rules, for example, the notice period and the time-for-suit period both start upon delivery of the goods concerned, but the term is not defined.

42. During the work of the International Subcommittee, it was suggested that it would be beneficial to define the term "delivery" and its consequences more precisely.

J. Right of control

43. During the time the cargo is in the custody of the carrier, the parties interested in the cargo (e.g. the shipper, the holder of any security right and the consignee) may wish to give particular instructions to the carrier for the performance of the contract of carriage. The carrier, in turn, would like to know from whom it is required to take instructions and with whom it could, in case a particular issue arises, negotiate different terms of the contract of carriage and collect additional costs. It is, therefore, thought that the new instrument should contain a rule on the right of control during transit. In doing so, maritime transportation

would come into line with most of the transport conventions applicable for other modes of transport that contain specific provisions on the right of control. Of course, the provisions should follow patterns adapted to the particular needs of maritime transport.

44. The first issue is what type of controlling rights may arise and should, therefore, be covered by the provisions of the instrument. Such rights to instruct the carrier may include the demand to stop the goods and deliver them before their arrival at the place of destination. That particular right is a collateral of the law provided for in the sales contract to stop the goods in transit, in cases when the buyer faces financial problems that would frustrate the sales contract. Another example is the shipper that has sold the goods to a party other than the consignee initially named in the contract of carriage and would like to substitute the consignee for that other party. Apart from these cases, there are a number of instructions that amount to a variation of the contract of carriage, such as a change in destination.

45. A major issue relating to the right of control is to determine the technique and the time when such a right of control is transferred from the shipper to another party and eventually to the consignee. The easiest case is when the transport is evidenced by a bill of lading. There, trade and national law provide that in order for the bill of lading holder to instruct the carrier it must present a full set of original bills of lading. This avoids any abuse when a holder of one of the original bills of lading relies on a particular right (including to request delivery at destination). The situation is slightly more complicated when no bill of lading but another transport document has been issued. Two variants are conceivable, neither of which has yet gained clear support. One solution would be to follow the concept stated in other transport conventions: if sea waybills have been issued, the party wanting to instruct the carrier or otherwise control the goods would have to present such documents to the carrier. The view was expressed, however, that this would highly overvalue the sea waybill in its current form and, therefore, the right of control should remain with the shipper until the cargo has been finally tendered to the consignee at destination.

46. The harmonizing instrument should further clarify that the carrier is allowed to request the instructing party to secure its costs before it actually follows the instructions.

K. Transfer of rights

47. The subject of transfer of rights is in many ways closely related to the issue of right of control addressed above. In order to determine who has a right of control, it is necessary to know who has a sufficient interest in the cargo. To the extent that a third party (i.e. not an original party to the contract of carriage) claims an interest in the cargo because it is the holder of a negotiable transport document (which will frequently be the case in practice), it is necessary to know how rights governed by a negotiable transport document are transferred.

48. Existing international regimes do not deal with this subject in any detail and national laws in many countries are not fully developed. During the work of the International Subcommittee, it was suggested that it would be beneficial to define the rules governing the subject more precisely. That effort could be particularly valuable as paper documents are replaced by electronic messages. When the introduction of new practices makes it more difficult to rely on prior practices, it becomes more important to have well-defined rules to facilitate the new practices. Some provisions would therefore simply attempt to restate and codify generally accepted laws and practices under current conditions. Other provisions would be more innovative and, probably, more controversial. For each new provision, there is generally a clear choice to be made as to whether or not to include it in the instrument being developed.

L. Rights of suit

49. In some legal systems, identifying the party that is entitled to bring an action against a carrier for loss, damage or delay can sometimes be a difficult problem. During the work of the International Subcommittee, it was suggested that it would be beneficial to define the rules governing the subject more precisely.

M. Time bar

50. There is widespread agreement that a cargo claimant should be permitted only a limited time period in which to bring an action for loss, damage or delay against a carrier. It remains to be determined whether that period should be one year (as in the Hague and Hague-Visby Rules) or two years (as in the Hamburg Rules).

N. Jurisdiction and arbitration

51. It would have to be considered whether and in what way the instrument to be drafted should address issues of jurisdiction and arbitration.

III. Conclusion

52. The preceding section summarizes the considerations in CMI, including the discussion at its conference in Singapore regarding issues that are giving rise to difficulties in the international carriage of goods and where modern solutions are needed. In the meantime the CMI International Subcommittee on transport law is continuing its work on identifying solutions, with alternatives and accompanying comments, designed to improve certainty and predictability in the international carriage of goods by sea and operations related thereto.

53. Consultations that the Secretariat has been conducting pursuant to the mandate it received from the Commission in 1996 indicate that work could now usefully be commenced towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI are making good progress and it is expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, could be prepared by December 2001.

54. It would thus be possible for the Commission to commence consideration of the feasibility, scope and content of a future legislative instrument in 2002. One possibility may be to entrust that task to an intergovernmental working group. Alternatively, the Commission may decide to undertake that consideration itself at its thirty-fifth session, in 2002. The decision as to whether the task should be assigned to a working group or whether the Commission should initially consider the matter itself may depend on whether the Commission has before it in 2002 a text to be finalized at that session. In line with well-established practice, in addition to States members of the Commission, other interested States and relevant intergovernmental and international non-governmental organizations would be invited in the capacity of observers to participate actively in the discussions. It is expected that CMI as well as other organizations representing the industries involved in the transport of goods by sea and in related operations will wish to be involved in those considerations.

55. If the Commission agrees with the suggested course of action, it may wish to request the Secretariat to prepare the necessary documentation for an intergovernmental UNCITRAL session during the second quarter of 2002.

Notes

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17).

[2] Ibid., para. 210.

[3] *Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

[4] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 264.

[5] Ibid., para. 266.

[6] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

[7] Ibid., para. 415.

[8] Ibid., para. 418.

[9] United Nations, *Treaty Series*, vol. 399, No. 5742.